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Issue Date: 16 January 2008

CASE NOS.: 2007-OFC-1
2007-OFC-2
2007-OFC-3

In the Matter of

OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR
Plaintiff

v.

UPMC BRADDOCK
UPMC SOUTH SIDE
UPMC McKEESPORT
Defendants

RECOMMEDED DECISION AND ORDER GRANTING MOTION FOR SUMMARY JUDGMENT BY OFCCP AND DENYING MOTION FOR SUMMARY JUDGMENT BY DEFENDANTS

These three cases involve cross motions for summary judgment by Plaintiff, Office of Federal Contract Compliance Programs (OFCCP) and the Defendants, UPMC Braddock, UPMC Southside and UPMC McKeesport, involving whether the Defendants are subject to Executive Order No. 11246 (30 Fed. Reg. 12319), as amended by Executive Order No. 11375 (32 Fed. Reg. 14303), Executive Order No. 12086 (43 Fed. Reg. 46501) (the Executive Order), Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §793 (Section 503), Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. § 4212 (VEVRAA), as well as the regulations at 41 C.F.R. §§ 60-30.23, 60-250.29 and 60-741.65.

Executive Order No. 11246 prohibits Federal contractors and subcontractors from discriminating against their employees based on color, religion, sex, national origin or age; and requires Federal contractors and subcontractors to take affirmative action to employ, advance in employment, and otherwise treat qualified applicants and employees without discrimination based on their color, religion, sex or national origin. Section 503 of the Rehabilitation Act protects employees of Federal contractors and subcontractors from discrimination based on disability. Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act protects employees of Federal contractors and subcontractors from discrimination based on disability and veteran status.

Plaintiff filed Administrative Complaints against Defendants on November 6, 2006 alleging that they had violated Executive Order 11246, Section 503 of the Rehabilitation Act, and Section 402 of VEVRAA. In their Answers to the Complaints, Defendants maintain that OFCCP lacks jurisdiction to require compliance with the Executive Order, VEVRAA, or Section 503 because they are not government contractors or subcontractors within the meaning of the Executive Order, VEVRAA, or Section 503.

Summary Judgment Standard

29 C.F.R. § 18.40(d) and 41 C.F.R. § 60-30.23 provide that an administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained through discovery or otherwise, or matters officially noted show there is no genuine issue of material fact that remains to be resolved and that a party is entitled to judgment as a matter of law. Here, the issue and material facts are the same in all three complaints, and there are no disputed issues of fact.

Statement of the Case

Defendants are hospitals in the Pittsburgh, Pennsylvania area. They are non-stock, non profit corporations, each with more than 50 employees. Each Defendant is a party to an agreement with UPMC Health Plan to provide medical products and services to individuals covered by UPMC Health Plan. The agreements set forth the medical products and services available to those individuals and the rate of payment and formula for payment from UPMC Health Plan to the Defendant hospitals for those medical products and services.

The U.S. Office of Personnel Management (OPM) has a contract with UPMC Health Plan to provide medical coverage to U.S. Government employees. This contract between OPM and UPMC Health Plan is the government contract which forms the basis of the OFCCP claims. The agreements between UPMC Health Plan and the Defendant hospitals providing for the covered services to the U.S. Government employees and the terms of payment are the subcontracts on which Plaintiff relies to provide jurisdiction under the Executive Order.

Stipulated Facts

1. Since July 1, 2002, Defendants UPMC Braddock (Braddock), UPMC South Side (South Side) and UPMC McKeesport (McKeesport) have been medical facilities and hospitals engaged in the business of providing medical services. Braddock, South Side and McKeesport are Pennsylvania non-stock, nonprofit corporations.

2. Since July 1, 2002, Braddock has been located at 400 Holland Avenue, Braddock, Pennsylvania 15104, South Side has been located at 2000 Mary Street, Pittsburgh, Pennsylvania 15203, and McKeesport has been located at 1500 Fifth Avenue, McKeesport, Pennsylvania 15132.

3. Since July 1, 2002, Braddock, South Side and McKeesport have each had 50 or more employees.

4. Until about June 2005, UPMC Rehabilitation Hospital (Rehabilitation Hospital) was a medical facility engaged in the business of providing rehabilitation services and was located at 1405 Shady Avenue, Pittsburgh, Pennsylvania 15217. Rehabilitation Hospital was a Pennsylvania non-stock, nonprofit corporation.

5. In or about June 2005, Rehabilitation Hospital merged with and into UPMC South Side ("Merger"). South Side is the surviving corporation of the Merger.

6. A true a correct copy of the Articles/Certificate of Merger and attached Plan and Agreement of Merger of South Side and Rehabilitation Hospital filed with the Pennsylvania Department of State, Corporation Bureau on June 28, 2005 is attached hereto as Joint Exhibit 1.

7. From July 1, 2002 until the Merger, Rehabilitation Hospital had 50 or more employees.

8. As a result of the Merger, all debts, liabilities and obligations of Rehabilitation Hospital became those of South Side, as provided in the Plan and Agreement of Merger.

9. From July 1, 2002 to the present, Braddock has had an agreement with UPMC Health Plan to provide medical services to persons whose coverage for such services was furnished by UPMC Health Plan. The initial agreement between Braddock and UPMC Health Plan was entered into prior to January 1, 2000; the agreement was amended in part or supplemented after January 1, 2000. True and correct copies of the document constituting and/or pertaining to the agreement between Braddock and UPMC Health Plan are attached hereto as Joint Exhibit 2.

10. From July 1, 2002 to the present, UPMC Health Plan has paid Braddock $50,000 or more annually for medical services and supplies that Braddock provided directly to individuals who were employees of the U.S. Government and whose coverage for such services and supplies was furnished under Contract No. 2856, as amended, between UPMC Health Plan and the U.S. Office of Personnel Management. Specifically, UPMC Health Plan paid Braddock the following amounts for such services and supplies during the following time periods (Braddock's fiscal year begins July 1):

July 1, 2003 through June 30, 2004:	$137,739.72
July 1, 2004 through June 30, 2005:	$180,817.41
July 1, 2005 through June 30, 2006:	$211,417.34
July 1, 2006 through December 31, 2006:	$127,027.93

11. From July 1, 2002 to the present, South Side has had a written agreement with UPMC Health Plan to provide medical services to persons whose coverage for such services was furnished by UPMC Health Plan. The initial agreement between South Side and UPMC Health Plan was entered into prior to January 1, 2000; the agreement was amended in part or

supplemented after January 1, 2000. True and correct copies of the documents constituting and/or pertaining to the agreement are attached hereto as Joint Exhibit 3.

12. From July 1, 2002 to the present, UPMC Health Plan has paid South Side $50,000 or more annually for medical services and supplies that South Side provided directly to individuals who were employees of the U.S. Government and whose coverage for such services and supplies was furnished under Contract No. 2856, as amended, between UPMC Health Plan and the U.S. Office of Personnel Management. Specifically, UPMC Health Plan paid South Side the following amounts for such services and supplies during the following time periods (South Side's fiscal year beings July1):

July 1, 2003 through June 30, 2004:	$373,495.43
July 1, 2004 through June 30, 2005:	$387,375.73
July 1, 2005 through June 30, 2006:	$511,423.82
July 1, 2006 through December 31, 2006:	$266,392.77

13. From July 1, 2002 until the Merger, Rehabilitation Hospital had a written agreement with UPMC Health Plan to provide medical services to persons whose coverage for such services was furnished by UPMC Health Plan. The initial agreement between Rehabilitation Hospital and UPMC Health Plan was entered into prior to January 1, 2000; the agreement was amended in part or supplemented after January 1, 2000. True and correct copies of the documents constituting and/or pertaining to the agreement are attached thereto as Joint Exhibit 4.

14. From July 1, 2002 until the Merger, UPMC Health Plan paid Rehabilitation Hospital $50,000 or more annually for medical services and supplies that Rehabilitation Hospital provided directly to individuals who were employees of the U.S. Government and whose coverage for such services and supplies was furnished under Contract No. 2856, as amended, between UPMC Health Plan and the U.S. Office of Personnel Management. Specifically, UPMC Health Plan paid Rehabilitation Hospital the following amounts for such services and supplies during the following time periods (Rehabilitation Hospital's fiscal year begins July 1):

July 1, 2003 through June 30, 2004:	$213,028.32
July 1, 2004 until Merger	$103,670.65

15. From July 1, 2002 to the present, McKeesport has had a written agreement with UPMC Health Plan to provide medical services to persons whose coverage for such services was furnished by UPMC Health Plan. The initial agreement between McKeesport and UPMC Health Plan was entered into prior to January 1, 2000; the agreement was amended in part or supplemented after January 1, 2000. True and correct copies of the documents constituting and/or pertaining to the agreement are attached hereto as Joint Exhibit 5.

16. From July 1, 202 to the present, UPMC Health Plan has paid McKeesport $50,000 or more annually for medical services and supplies that McKeesport provided directly to individuals who were employees of the U.S. Government and whose coverage for such services and supplies was furnished under Contract No. 2856, as amended, between UPMC Health Plan and the U.S. Office of Personnel Management. Specifically, UPMC Health Plan paid

McKeesport the following amounts for such services and supplies during the following time periods (McKeesport's fiscal year begins July 1):

July 1, 2003 through June 30, 2004:	$373,183,60
July 1, 2004 through June 30, 2005:	$498,386.62
July 1, 2005 through June 30, 2006:	$470,663.97
July 1, 2006 through December 31, 2006:	$205,810.73

17. The agreements between UPMC Health Plan and the individual hospitals, as contained in Joint Exhibits 2-5, set forth the medical products and services available to individuals insured by UPMC Health Plan. The agreements cover the time period from July 1, 2002 to the present. The initial agreements between the hospitals and UPMC Health Plan (including predecessors to UPMC Health Plan) were entered into prior to January 1, 2000, the agreements were amended in part or supplemented after January 1, 2000.

18. The agreements between UPMC Health Plan and the individual hospitals, as contained in Joint Exhibits 2-5, set forth the rates of payment and formulas for payment used to establish the monetary amounts UPMC Health Plan paid the hospitals for medical products and services provided to individuals covered by UPMC Health Plan from approximately July 2002 to the present.

19. The agreements between UPMC Health Plan and the individual hospitals, as contained in Joint Exhibits 2-5, are not limited or specific to government employees covered under Contract No. 2856 between UPMC Health Plan and the U.S. Office of Personnel Management. The agreements contained in Joint Exhibits 2-5 pertain to all individuals covered by UPMC Health Plan.

20. None of the agreements between UPMC Health Plan and the individual hospitals, as contained in Joint Exhibit 2-5, contain a specific, written provision obligating the hospitals to comply with Executive Order 11246 (or any of its amendments), Section 503 of the Rehabilitation Act (or any of its amendments) or Section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act.

21. UPMC Health Plan, Inc. and the U.S. Office of Personnel Management entered into Contract No. 2856 effective January 1, 2000. Contract No. 2856, as amended effective January 1, 2003, between UPMC Health Plan and the U.S. Office of Personnel Management is attached hereto as Joint Exhibit 6. A true and correct copy of the Standard Contract Amendment to Contract No. 2856 effective January 1, 2002 is attached hereto as Joint Exhibit 7. A true and correct copy of the Standard Contract Amendment to Contract No. 2856 effective January 1, 2004 is attached hereto as Joint Exhibit 8.

22. None of the hospitals at issue (UPMC Braddock, UPMC McKeesport, UPMC Rehabilitation Hospital and UPMC South Side) contracted directly with the United States Government.

23. None of the hospitals at issue (UPMC Braddock, UPMC McKeesport, UPMC Rehabilitation Hospital and UPMC South Side) are "prime contractors" as referenced at 41 C.F.R. § 60-1.4 (c).

24. OFCCP sent to each of the hospitals at issue (UPMC Braddock, UPMC McKeesport, UPMC Rehabilitation Hospital and UPMC South Side), and the hospitals received, letters dated January 15, 2004, true and correct copies of which are attached hereto as Joint Exhibit 9 (collectively, "Scheduling Letters").

25. In response to the Scheduling Letters, none of the hospitals at issue (UPMC Braddock, UPMC McKeesport, UPMC Rehabilitation Hospital and UPMC South Side) ever provided to OFCCP a copy of an Executive Order Affirmative Action Plan, a copy of Section 503/38 U.S.C. 4212 AAP, or any of the data described in paragraphs 7 through 11 of the Itemized Listing attached to each of the Scheduling Letters.

26. OFCCP sent, and the hospitals at issue (except for Rehabilitation, which had previously merged with South Side) received, the letter dated September 26, 2006, a true and correct copy of which is attached hereto as Joint Exhibit 10.

27. The hospitals' counsel sent, and OFCCP received, the letter dated October 11, 2006, a true and correct copy of which is attached hereto as Joint Exhibit 11.

28. During the period from July 1, 2002 to the present, each of the individual hospitals, including UPMC Rehabilitation Hospital while it was in operation, provided services or benefits described in Section 5 of the brochure attached as Appendix A to Contract No. CS 2856 between UPMC Health Plan and the U.S. Office of Personnel Management to individuals employed by the U.S. Government who participated in the UPMC Health Plan. [Joint Exhibit 6, Appendix A, Section 5; Defendants' Answers to Interrogatory No. 10 of Plaintiff First Set of Interrogatories, attached hereto as Government Exhibit 1.]

29. OFCCP attempted unsuccessfully to conciliate a resolution of the dispute between the parties before filing the Administrative Complaints. [Government Exhibit 2, Declaration of Richard T. Buchanan and attachments.]

Discussion

The issue in a nutshell is whether the Defendant hospitals can be considered subcontractors of UPMC under UPMC's contract with OPM and, therefore, fall within the jurisdiction of the Executive Order.

OFCCP regulations applicable here provide that a "subcontractor" is any person holding a "subcontract." *See* 41 C.F.R. § 60-1.3; 41 C.F.R. § 60-250.2; 41 C.F.R. § 60-741.2. A "subcontract" is defined as:

> '"[A]ny agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):
> (1) For the furnishing of supplies or services or for the use of real or personal property, including lease arrangements, which in whole or in part, is necessary to the performance of any one or more contracts; or
> (2) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken or assumed.

41 C.F.R. § 60-1.3

Plaintiff argues that the Defendants are subcontractors under the jurisdiction of the Executive Order, VEVRAA, and Section 503 because the agreements between UPMC Health Plan and the Defendant hospitals constitute a subcontract as defined by the OFCCP regulations as they require the hospitals to provide services and supplies which are necessary to the performance of UPMC Health Plan's contract with OPM, and to perform or undertake a portion of UPMC Health Plan's obligation under that contract.

UPMC Health Plan has had a contract with OPM since January 1, 2000 to provide medical benefits to federal employees. The medical benefits are described in a brochure given to federal employees. The brochure informs the federal employees that:

> This Plan is a health maintenance organization (HMO). We require you to see specific physicians, hospitals, and other providers that contract with us. These Plan providers coordinate your health care services. The Plan is solely responsible for the selection of these providers in your area.

Contract between OPM and UPMC Health Plan, App. A , § 1, p. 6.

With limited exceptions, the Health Plan requires that participants get their care from these providers. The providers that the Plan references as having contracts with UPMC Health Plan include the three Defendants. The benefits that the Heath Plan agrees to provide under its contract with OPM include medical services and supplies, surgical and anesthesia services, hospital and ambulance services, emergency services, mental health and substance abuse benefits, prescription drug benefits, and dental benefits.

Defendants provide five arguments why they are not subcontractors as defined by 41 C.F.R. § 60-1.3.

1. Defendants are not Subcontractors Under the Terms of the Contract Between OPM and UPMC

Initially, Defendants argue that the government expressly agreed that the Defendant hospitals are not subcontractors as the contract between OPM and UPMC expressly provides that the hospitals are not subcontractors. Defendants reference § 1.1 of the contract between OPM and UPMC which defines the term contractor as follows:

> Subcontractor: Any supplier, distributor, vendor or firm that furnishes supplies or services to or for a prime contractor, or another subcontractor, *except for providers of direct medical services or supplies pursuant to the Carrier's health benefits plan.*

Health Plan Contract, § 1.1 (emphasis added)

Defendants refer to the clause of § 1.1 excepting the providers of direct medical services or supplies from the definition of subcontractor, and assert that since the Defendant hospitals are obviously medical facilities engaged in the business of providing medical services, they can not be considered subcontractors under the Health Plan Contract.

Defendants argue that the express language of § 1.1 cannot be ignored, particularly since the Executive Order is based on contract law, and in that the absence of a contract with the federal government, the Executive Order has no applicability and OFCCP has no authority to audit the work place statistics.

Defendants are correct that for the purpose of interpreting and effectuating the Health Plan Contract, the term subcontractor is defined by § 1.1 to exclude hospitals, and that under § 1.1 many of the provisions of the contract do not apply to hospitals. As an example, Plaintiff points out that hospitals do not have to comply with § 1.22 of the Health Plan Contract which requires carriers and subcontractors to comply with HIPAA. However, Plaintiff argues that § 1.1 does not exclude the Defendant hospitals from being considered contractors under the Executive Order. Plaintiff contends that that the provisions of § 1.1 of the Health Plan Contract cannot relieve Defendants of their obligations under federal law, in that it cannot override the established authority of the Secretary of Labor to enforce the Executive Order.

Plaintiff is correct. The Courts have held that provisions in a government contract that violate or conflict with a federal statute are invalid or void, and the Executive Order has been held by the Administrative Review Board and the Courts to have the effect and force of law. *United States v. New Orleans Public Service, Inc*. 553 F.2d 459 (5th Cir. 1977); *OFFCP v. Uniroyal*, 1977-OFCCP-1 (Sec'y., June 28, 1979).

In *American Airlines, Inc., v. Austin*, 75 F.3d 1535 (Fed. Cir.1996), the Court held that provisions within an airline ticket and tariffs incorporated into the ticket by reference requiring the GSA to seek reimbursement for those that were unused within certain time limits were invalid because they conflicted with a statute, The Transportation Payment Act of 1972, which excludes limitation on the Governments' right to recover advance payments on unused tickets. See also, *Burnside-Ott Aviation Training Center v. Dalton,* 107 F.3d 854 (Fed. Cir. 1997) (Court held that a provision in a contract between the Navy and a contractor that granted unilateral discretion to a government official to determine the fee under the contract was void because it was contrary to the Contract Disputes Act.)

Thus, an interpretation of § 1.1 of the Health Plan Contract which would exclude certain subcontractors, such as the Defendant hospitals, from compliance with the Executive Order would be invalid as contrary to a federal statute.

Moreover, it is doubtful that OPM can preempt the jurisdiction of these Acts by a provision in any contract it enters into with UPMC. The Secretary held in *OFCCP v. Yellow Freight Systems, Inc.*, Case No. 1979-OFCCP-7 (Apr. 8, 1987) that the Department of Transportation rules on qualification of drivers cannot be interpreted to preempt jurisdiction of the Rehabilitation Act. Also, the Administrative Review Board held in *OFCCP v. Goya De Puerto Rico, Inc.,* Case No. 1998-OFC-8 (ALJ, June 22, 1999) that disputes between the government and government contractors under the Executive Order, VEVRAA and Section 503 must be resolved pursuant to the enforcement procedures adopted there under notwithstanding the existence of a contract disputes clause in the contract. See also, *OFCCP v. Texas Industries, Inc*, 1980-OFCCP-28 (Sec'y., June 7, 1988) (The Secretary stated that the Department of Transportation authority over physical qualifications for drivers does not provide a basis for finding that DOT administrative remedies must be exhausted as a prerequisite to a Section 503 of the Rehabilitation Act proceeding.)

Accordingly, the provisions § 1.1 of the Health Plan Contract do not override the established authority of the Secretary by relieving Defendant hospitals of their obligations under the Executive Order.

2. Defendant Hospitals Did Not Agree to Subject Themselves to the Executive Order

Defendants argue that they are not subject to the Executive Order because the equal opportunity clause (EOC)[1] contained therein can only be triggered by the voluntary agreement of a party. Defendants assert that they never entered into a government contract, never agreed to be bound by the EOC, and never subjected themselves to the requirements the Plaintiff is now seeking to impose. Rather, a contract was entered into between UPMC Health Plan and OPM, under which the Defendants, as potential subcontractors, would be bound by the terms of the EOC.

In support of their position, Defendants present three arguments. First, Defendants argue that they were "notified" by the definition of subcontractor contained in the agreement between UPMC Health Plan and OPM that the Defendant hospitals were excluded from the scope of the Executive Order. Second, Defendants argue that they are not bound because the subcontracts do not reference the Executive Order and do not contain provisions requiring compliance with the Executive Order. Finally, Defendants argue that the payment agreements with UPMC pre-date the effective date of the contract between OPM and UPMC Health Plan, further indicating that the hospitals did not voluntarily agree to become subcontractors.

In response, Plaintiff argues that whether the Defendant hospitals knew or believed that they were subject to the Executive Order, Section 503, or the VEVRAA is irrelevant and does

[1] 41 CFR § 60-1.4 refers to the anti-discrimination provision of the Executive Order as the equal opportunity clause.

not define their status as a subcontractor. Plaintiff also argues that the operation of the EOC by law eliminates any argument that the Defendants were "notified" that they were not subcontractors. Finally, Plaintiff cites to 41 C.F.R. §60-1.4(e) as providing that the mere omission of the EOC in the Defendants' contracts, and the timing of the execution of the contract, does not relieve Defendants of the Executive Order's requirements.

Defendants present case law that they argue supports their position that the EOC is triggered only by the voluntary agreement of a party. The cases unequivocally indicate that if a party does not wish to be bound by the terms of the EOC, then the party is free to refrain from contracting with the government. After a contract has been entered into, however, compliance with EOC "is so well known and well entrenched that anyone who does business with the government is held to that obligation." *Beverly Enterprises, Inc. v. Herman*, 130 F.Supp.2d 1, 18 (D.D.C. 2000). See also, *Yeager v. General Motors Corp*., 67 F.Supp.2d 796 (N.D. Ohio 1999); *McLaughlin v. Great Lakes Dredge & Dock Co*., 495 F.Supp. 857 (D. Ohio 1980).

Defendants' argument from the case law is accurate in principle, but fails in its application to the instant case. The case law cited by the Defendants refers to the voluntary decision of a *prime contractor* to enter into a contract with the government. [Emphasis added]. Defendants have presented no case law to support the proposition that the *subcontractor* must voluntarily enter into a government contract in order to be bound by the terms of the EOC. [Emphasis added]. Thus, the cases cited by the Defendants do not govern the instant claim.

41 C.F.R. §60-1.4(c), governing the applicability of the EOC to subcontracts, further belies Defendants' voluntariness argument. 41 C.F.R. §60-1.4(c) provides, "each nonexempt prime contractor or subcontractor *shall* include the equal opportunity clause in each of its nonexempt sub-contracts." [Emphasis added]. In the absence of a showing of contrary legislative intent, the word "shall" is mandatory and does not permit discretion. *Oberneder v. Link Computer Corp*., 548 Pa. 201, 696 A.2d 148 (1997). Thus, the regulation clearly dictates that the EOC applies to all contracts and subcontracts that are not exempted. The regulation does not indicate that the EOC is applied only where the contractor or subcontractor has voluntarily elected to make itself subject to the provisions. Rather, the rule is mandatory and applicable to nonexempt contractors and subcontractors regardless of intent to be bound.

Defendants' argument that they were "notified" by the definition of subcontractor found at § 1.1 of the contract between UPMC Health Plan and OPM that they were excluded from compliance with the requirements of the Executive Order is without merit. As previously discussed, a government contract that violates or conflicts with a federal statute is invalid or void. As such, the definition of subcontractor found in the contract does not exempt Defendants from the requirements of the EOC, and, therefore, could provide no "notice."

Defendants' arguments that they are not bound because of the omission of the EOC in the Defendants' contracts with UPMC Health Plan is also without merit. 41 C.F.R. §60-1.4(e) states:

> By operation of the order, the equal opportunity clause shall be considered to be a part of every contract and subcontract required by the order and the regulations in this part to include such a clause whether or not it is physically incorporated in

> such contracts and whether or not the contract between the agency and the contractor is written.

Thus, 41 C.F.R. §60-1.4(e) unequivocally provides that the EOC is incorporated into all non-exempt contracts by operation of law, thereby rendering it applicable regardless of whether it appears in the contract. As such, the mere fact that the EOC did not appear in the Defendants' contracts with UPMC Health Plan does not relieve Defendants of the Executive Order's requirements. In *OFCCP v. First Federal Savings Bank of Indiana*, 1991-OFC-23 (Sec'y., Oct. 26, 1995), the Defendants argued that they were not bound by Executive Order 11246 because the agreements did not contain any reference to the equal opportunity clause. The Secretary held that the regulations establish that "[b]y operation of the [Executive] order, the equal opportunity clause shall be considered to be a part of every contract . . . required by the order and regulations…to include such a clause whether or not it is physically incorporated in such contracts…." Thus, the mere fact that the clause was not included in the Defendants' contracts does not relieve them of the obligation to comply.

Defendants' argument that they are not bound because their agreements with the UPMC Health Plan pre-date the effective date of the Health Plan-OPM contract fails for the reasons set forth above. While Defendants argue that the timing of the execution of the contracts suggests no intent to become government subcontractors, the requirement of a voluntarily executed agreement refers only to the decision of the prime contractor to enter into an agreement with the government. Additionally, the plain language of 41 C.F.R. §60-1.4(c) indicates that the requirements of the EOC are applicable regardless of intent to be bound. Furthermore, 41 C.F.R. §60-1.4(e) applies to cover those situations in which the EOC does not appear in the contract, such as the failure of the parties to amend a previously executed contract. Pursuant to 41 C.F.R. §60-1.4(e), the mere fact that the contract does not contain the clause does not eliminate compliance obligations because the EOC is incorporated by operation of law. Plaintiff accurately notes that unless 41 C.F.R. §60-1.4(e) applies, a subcontractor or a government contractor could "escape its EEO obligations based on the mere fact that its subcontract omits any reference to the Executive Order, Section 503, or the VEVRAA." *See,* Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment, p. 10. Therefore, Defendants' argument that the timing of the execution of the contracts eliminates the need to comply is without merit.

3. Medical Services Provided by the Hospitals are not Nonpersonal Services.

Defendants argue that the Executive Order, Section 503 of the Rehabilitation Act, and the VEVRAA do not apply because the instant case does not involve contracts for the sale of goods or the provision of nonpersonal services.

The term "subcontract" is defined at 41 C.F.R. 60-1.3 of the Executive Order 11246 regulations:

> Subcontract means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

(1) For the purchase, sale or use of personal property or *nonpersonal* services which, in whole or in part, is necessary to the performance of any one or more contracts… [Emphasis added]

The term "government contract" is defined at 41 C.F.R. 60-1.3:

> Government contract means any agreement or modification thereof between any contracting agency and any person for the purchase, sale or use of personal property or nonpersonal services….The term "nonpersonal services" as used in this section includes, but is not limited to, the following services: Utilities, construction, transportation, research, insurance, and fund depository. The term Government contract does not include:
>
> (1) Agreements in which the parties stand in the relationship of employer and employee…

Defendants allege that they are not subcontractors because the medical services that they provide are not nonpersonal. They point out that the Executive Order, Section 503, and the VEVRAA do not define nonpersonal services but rather provide only a nonexclusive list of examples of nonpersonal services, such as utilities, construction, transportation, research, insurance, and fund depository, which bear no relation to the medical services they have contracted to provide such as colonoscopy and proctology examinations which are intuitively personal. As such, Defendants assert that personal medical treatment falls outside the scope of nonpersonal services, and, thus, the agreements in question cannot be called government subcontracts.

Plaintiff agrees with Defendants that neither the Executive Order, Section 503, the VEVRAA, nor their implementing regulations define the term nonpersonal services. Plaintiff, however, points to the definition of the term as defined in the Federal Acquisition Regulation at 48 C.F.R. §37.101. Section 37.101 defines nonpersonal service contract as "a contract under which the personnel rendering the services are not subject, either by the contract's terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government and its employees." A personal services contract, by contrast, is one "characterized by the employer-employee relationship it creates between the government and the contractor's personnel." 48 C.F.R. §37.104(a).

The definition of nonpersonal services contract as found in the FAR is applicable to the instant case. The purpose of the FAR is to codify and publish uniform policies and procedures for acquisition by all executive agencies. 48 C.F.R. §1.101. Part 22 of the FAR is titled "Application of Labor Laws to Government Acquisitions," of which Subpart 22.8 on Equal Employment Opportunity is intended to "prescribe policies and procedures pertaining to nondiscrimination in employment by contractors and subcontractors." 48 C.F.R. §22.800. Furthermore, the Health Plan Contract itself identifies the FAR as a source to be consulted when resolving discrepancies between the contract and substantive law. Plaintiff notes that the definition of contract found in the FAR at 48 C.F.R. §22.801 is defined the same way that it

appears in 41 C.F.R. §§60-1.3, 60-250.2, and 60-741.2.[2] Additionally, Defendants have referred to the FAR as support for several of its arguments. Thus, the definition of nonpersonal services contract as found in the FAR is applicable to the instant claim.

Nonpersonal services is interpreted by §37.101 to refer to a contract in which the personnel providing the service are not subject to the supervision and control that would appear in a typical relationship between the Government and its employees. In essence, a nonpersonal service contract is one in which the individual(s) providing the service have greater control over the means and manner of work than would generally be found in an employer-employee relationship. Under said definition, it is clear that Defendants are providing nonpersonal services. The manner of administration of medical services to individuals is not subject to the supervision and control that the Government normally exercises over its employees. Rather, the medical service providers have significant autonomy in the selection and administration of care. There is no indication that the Government, in any way, dictated to the personnel rendering treatment which services were available or the manner in which they were to be provided. Since the Government exercised minimal, if any, control over the personnel rendering services, the Defendants fall under the definition of nonpersonal services.

Defendants have presented no support for their construction of the term nonpersonal services, that is, services that are individualized or relate to a personal interaction, such as the colonoscopy or mammogram. As such, their construction is not accepted.

Defendants also argue that to interpret nonpersonal services contract as characterized by an absence of the employer-employee relationship violates the canons of statutory construction. Specifically, Defendants argue that it is superfluous to "suggest that the regulation impliedly excluded agreements where the parties stand in the relationship of employer and employee …but then went on to expressly exclude the exact same thing." See, Defendants' Brief at 17-18. Such is not the case. 41 C.F.R. §60-1.3 defines government contract as a sale of personal property or nonpersonal services. Unfortunately, the regulation is not a model of clarity. It does not provide definitions of personal property and nonpersonal services but rather attempts to define them by listing nonexclusive examples. The definition's specific exclusion of agreements where the parties stand in the relationship of employer and employee is an attempt to narrow the definition by further clarification and, as such, it is not "superfluous".

Plaintiff's final argument is that even if the medical services provided by the Defendants are considered personal, Defendants have admitted that they provide medical supplies to federal government enrollees, thereby making them subcontractors. 41 C.F.R. §60-1.3 states, "the term "personal property," as used in this section, includes supplies, and contracts for the use of real property…." Therefore, as the provision of medical supplies falls under the definition of personal property, the Defendants can be considered subcontractors.

[2] The only difference between the definition of subcontract found at 48 C.F.R. §22.801 and 41 C.F.R. §60-1.3 is the use of "that" as opposed to "which."

4. Imposing the Executive Order's Affirmative Action Obligation on the Hospitals Without Their Consent is Outside the Scope of Legislative Authority.

Defendants cite to *Liberty Mutual Ins. Co. v. Friedman*, 639 F.2d 164 (4th Cir. 1981), in support of their argument that imposing the Executive Order's requirements on them is not within the grant of legislative authority. Plaintiff, on the other hand, asserts that the rationale applied in *Liberty Mutual* is not applicable to the instant claim, and, in the alternative, that the present claim meets the requirements of the nexus test applied in *Liberty Mutual*.

The issue presented in *Liberty Mutual*, was whether the Secretary had the statutory authority to require Liberty, as a worker's compensation underwriter who held no government contracts, to comply with Executive Order 11246. *Liberty Mutual*, 639 F.2d at 169. To determine whether the Secretary's actions fell within the scope of the legislative authority, the Court examined the origins of the congressional authority for Executive Order 11246. The Court found that the statutory source of congressional authorization was the Federal Property and Administrative Services Act (The Procurement Act), 40 U.S.C. § 471 *et seq*. *Id*. at 169. The Court applied a nexus test, stating "any application of the [Executive] Order must be reasonably related to the Procurement Act's purpose of ensuring efficiency and economy in government procurement (whether direct or assisted) in order to lie within the statutory grant." *Id*. At 170. Applying the nexus test to the facts in *Liberty Mutual*, the Court found that the Secretary had exceeded the authority of the Executive Order. *Id*. at 172. Specifically, the Court found that while Liberty fell within the regulatory definition of a subcontractor, there was not a sufficient nexus with the Procurement Act's goal of avoiding cost increases caused by employment discrimination to bring the Secretary's actions within the grant of legislative authority. *Id*.

Defendants argue that the analysis applied in *Liberty Mutual* governs the instant case. Defendants, however, have presented little persuasive argument in support of their position. Defendants have merely asserted that even if they fall under the regulatory definition of subcontractor, "the same analysis applied in *Liberty* applies in this case." See, Defendants' Brief at 20. Defendants have made no further attempt to explain why *Liberty Mutual* is applicable or why the instant claim does not meet the nexus test. Rather, Defendants make only the bold assertion that the rationale applied in *Liberty Mutual* applies to the present claim. *Liberty Mutual* is a case rooted firmly in the factual posture, and Defendants have failed to set forth the facts or analysis that makes the rationale applicable.

Plaintiff, however, has argued persuasively that *Liberty Mutual* does not apply, and, in the alternative, has asserted that the instant claim meets the nexus test. Plaintiff indicates that there is a clearly identifiable relationship to keeping government costs low by "maintaining an adequate labor pool unrestricted by discriminatory practices." See, Plaintiff's Brief at 16. Defendants have not refuted Plaintiff's argument, and have not presented an argument of their own. Furthermore, Plaintiff has presented case law from other jurisdictions indicating that other courts of appeals have found a "broader source of authority" upon which Executive Order 11246 is based. Defendants argument that *Liberty Mutual* applies and renders the Secretary's acts outside the scope of legislative authority is without merit.

5. ARB's Decision in *OFCCP v. Bridgeport Hospital* Requires a Finding that Defendants are not Subcontractors under the Executive Order

Defendants reference the Administrative Review Board's decision in the case of *OFCCP v. Bridgeport Hospital*, Case No. 00-034, 2003 WL 244810 Jan. 31, 2003 as being determinative of the issue presented here. Defendants argue that *Bridgeport's* application to the present facts requires a finding that the Defendant hospitals can not be considered subcontractors under 41 C.F.R. § 60-13 because UPMC's commitment to OPM under the prime contract is that of an insurance provider and, therefore, differs from the obligation of the Defendant hospitals to UPMC.

Bridgeport's facts are similar to those here. Bridgeport is a hospital providing medical services to federal employees under an agreement with Blue Cross/Blue Shield of Connecticut, Inc. (Blue) governing the terms of payment from Blue to Bridgeport for the covered services. OFCCP argued that Bridgeport was a subcontractor required to comply with the Executive Order because of Blue's contract with OPM to furnish health insurance to government employees under the Federal Employees Health Benefits Program. The ARB disagreed with OFCCP, finding that Bridgeport was not a subcontractor under the Executive Order because Blue's contract with OPM did not require Blue to provide its policy holders with medical care.

The ARB's decision in *Bridgeport* was issued on appeal from an ALJ decision finding that Bridgeport hospital was not a subcontractor as defined by 41 C.F.R. § 60-1.3 because the agreement between Bridgeport and Blue was not necessary to fulfill the prime contract between Blue and OPM. The ALJ decision reasoned that OPM's agreement with Blue required Blue to furnish health insurance to government employees, and Blue's reimbursement to the government employees pursuant to the health insurance agreement was not dependant on any agreement between Blue and Bridgeport as the government employees could have sought medical care from any provider. The ARB agreed with the decision of the ALJ but did not totally accept his reasoning. Rather, the ARB reasoned that it was not necessary to reach the question of whether Blue's agreement with Bridgeport was necessary to the performance of the prime contract between Blue and OPM because the first premise of OFCCP's argument failed as Blue had no commitment to OPM to provide the government employees with medical care. Said differently, the ARB reasoned that Bridgeport hospital's mission is to provide medical care, but the agreement between OPM and Blue involved providing insurance. The ARB reasoned: "…we agree with the ALJ that Blue did not contract with OPM to provide its policyholders with medical services. Blue contracted with OPM to provide reimbursement to its policy holders for medical care costs." *Bridgeport,* at 6.

The parties disagree over the affect of the holding in *Bridgeport* on the present facts. Defendants argue that *Bridgeport* requires Plaintiff to show that OPM's agreement with UPMC obligates UPMC to itself be a provider of medical care to the federal employees in order to find Defendants to be subcontractors under 41 C.F.R. § 60-1.3. Defendants reason that they could not be subcontractor's under 41 C.F.R. § 60-1.3 because, "[t]he [UPMC] Health Plan employs no doctors or providers of medical care responsible for treating individuals insured under the Health Plan." See Defendants' Reply Brief, at p. 2**.**

Defendants' interpretation is not accepted. The ARB's decision in *Bridgeport* turned on whether it found OPM's agreement with Blue to require Blue to provide its enrollees with medical insurance or with medical services. The ARB's reasoning did not concern whether the contract required Blue to itself provide the medical services.

The present case differs significantly from *Bridgeport* in that OPM's contract with UPMC Health Plan requires more than reimbursement for medical services. It requires UPMC Health Plan to put into operation a health maintenance organization. Appendix A to the OPM/UPMC Health Plan agreement is a brochure explaining the health plan benefits. Its first section, entitled Facts about this HMO Plan, describes the plan as a health maintenance organization that coordinates the health care services, requires the enrollee to see specific physicians, hospitals, and other providers that contract with the plan, and is solely responsible for the selection of the providers. The brochure also provides that the enrollee must get care from providers who contract with the Health Plan, as the plan will pay for care outside the area only with prior plan approval or in the case of an emergency. Thus, fulfillment of the OPM/UPMC Health Plan agreement requires more than reimbursement of medical costs. It depends on medical providers, such as the Defendant hospitals, to offer the services and supplies necessary for UPMC to comply with its contract with OPM. The agreement between UPMC and the Defendants clearly requires the Defendants to furnish the services necessary for UPMC to meet its obligations with OPM, and, thus, the Defendants meet the definition of subcontractor under 41 C.F.R. § 60-1.3.

Defendants acknowledge that UPMC's obligations differ from those of Blue Cross/Blue Shield of Connecticut, Inc under their respective contracts with OPM because the UPMC Health Plan is an HMO as opposed to a fee for service arrangement. Defendants contend, however, that the UPMC Health Plan must still be considered an insurance provider under *Bridgeport* in light of the decision of the United States Supreme Court in *Rush Prudential HMO, Inc. v. Moran,* 536 U.S. 355, 122 S.Ct. 2151 (2002).

The issue before the Court in *Rush* was whether an HMO could be considered an insurer. It involved an action against an HMO seeking reimbursement for surgery under an Illinois statute requiring HMOs to provide a remedy for disputes. The District Court granted summary judgment on the grounds of preemption by ERISA which has exclusive jurisdiction over disputes involving employee benefits plans. The U.S. Supreme Court disagreed, holding that the lawsuit was not preempted by ERISA as ERISA includes a savings clause providing that state laws which regulate insurance are saved from preemption. The Court found that an HMO acts both as an insurer and a health care provider, that is, it provides health care and it does so as an insurer. The Court held that nothing in the savings clause requires an either-or choice between health care and insurance in deciding the preemption question.

Rush does not support the Defendants' position. *Rush* characterized an HMO as a health care delivery system that is defined by the providing of medical benefits and the assuming of financial risk in providing those benefits. It explained that if a participant never gets sick the HMO keeps the fixed fee, but if a participant becomes expensively ill, the HMO is responsible for the treatment. Defendants quote the Court as stating that common sense cannot be checkmated by trying to submerge HMO's insurance features beneath an exclusive

characterization of HMOs as providers of health care. Although *Rush* emphasizes an HMO's insurance features, it also acknowledges that a characteristic of an HMO is its obligation to provide health care to its members.

Moreover, a consideration of whether an HMO is a medical care provider or an insurance provider skirts the real issue. The determinative issue is whether the contracting hospitals can be considered subcontractors under 41 C.F.R. § 60-1.3. Arguably, fee-for-service organizations, or strictly insurance providers, are not subcontractors under *Bridgeport,* as such organizations are charged with providing reimbursement to their members for health care expenses without concern over who actually provides the health care. However, an HMO by its nature arranges and provides for the medical services through the medical providers such as the Defendant hospitals with which it contracts. Thus, the hospitals and other medical providers are clearly necessary for the fulfillment of UPMC's contract with OPM and are subcontractors under 41 C.F.R. § 60-1.3. The ARB decision in *Bridgeport* does not preclude a finding that the Defendant hospitals are subcontractors under 41 C.F.R. § 60-13.

In summary, the Defendants are found to be subcontractors to a contract with the Federal Government and are, therefore, subject to the requirements of Executive Order No. 11246, Section 503 of the Rehabilitation Act of 1973, and Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974.

ORDER

In consideration of the aforesaid, it is hereby ORDERED that:

1. Defendants' Motion for Summary Judgment is denied;

2. OFCCP's Motion for Summary Judgment is granted; and

3. Defendants shall permit OFCCP to proceed with its compliance review under Executive Order No. 11246, Section 503 of the Rehabilitation Act of 1973, and Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974.

A
THOMAS M. BURKE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file exceptions ("Exception") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's recommended decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Any request for an extension of time to file the Exception must be filed with the Board, and copies served simultaneously on all other parties, no later than three (3) days before the Exception is due. *See* 41 C.F.R. § 60-30.28.

On the same date you file the Exception with the Board, a copy of the Exception must be served on each party to the proceeding. Within fourteen (14) days of the date of receipt of the Exception by a party, the party may submit a response to the Exception with the Board. Any request for an extension of time to file a response to the Exception must be filed with the Board, and copies served simultaneously on all other parties, no later than three (3) days before the response is due. *See* 41 C.F.R. § 60-30.28.

Even if no Exception is timely filed, the administrative law judge's recommended decision, along with the record, is automatically forwarded to the Board for a final administrative order. *See 41 C.F.R. § 60-30.27.*